IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-748

BURLINGTON NORTHERN INC.,

Petitioner,

— vs —

HELEN TORCHIA, individually and as a personal representative,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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BURLINGTON NORTHERN INC., a corporation,
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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Montana entered in the above-entitled case on August 31, 1977.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of the State of Montana has not yet been published in the official reports and is printed in Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Montana was entered on August 31, 1977. Under the Rules of Appellate Civil Procedure for the Supreme Court of the State of Montana Petitioner was not required to and in this case did not choose to file a Petition for Rehearing in the Supreme Court of the State of Montana. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3), since this case involves rights claimed under a statute of the United States, the Federal Employers' Liability Act (45 U.S.C. Sec. 51 et seq.).

QUESTION PRESENTED

Whether the element of punitive damages can be considered for any purpose in a case governed by the Federal Employers' Liability Act (45 U.S.C. Sec. 51 et seq.).

STATUTE INVOLVED

The statutory provision involved is Section 1 of the Federal Employers' Liability Act, 45 U.S.C. Sec. 51, printed in Appendix B.

STATEMENT

On May 11, 1971, respondent's decedent, Gennaro Torchia, was instantly killed in a headon collision of two trains owned by petitioner Burlington Northern Inc.

In a complaint dated April 22, 1974, respondent filed an action against petitioner under the provisions of the Federal Employers' Liability Act, (hereafter FELA), 45 U.S.C. Sec. 51 et seq. In her complaint plaintiff alleged facts that would form the basis of an award of punitive

damages and plaintiff sought the sum of $500,000 in punitive damages in the prayer of her complaint.

Petitioner filed a motion to strike those portions of the complaint which pertain to punitive damages on the ground that punitive damages are not an element of damage that can be considered in a FELA case. Petitioner's Motion to Strike is appended to this petition as Appendix C.

Petitioner's motion to strike allegations pertaining to punitive damages from the complaint was denied. Petitioner then filed its formal answer to the complaint in which petitioner admitted negligence under the Federal Employers' Liability Act. Petitioner did not affirmatively allege the affirmative defense of contributory negligence.

Prior to the commencement of the trial in the state trial court Petitioner filed a Motion in Limine together with a Memorandum of Points and Authorities in support of the Motion in Limine, again aimed at the element of punitive damages in an FELA case. The motion in limine and the memorandum of points and authorities in support of the motion in limine are appended to this petition as Appendix D.

Petitioner's motion in limine was overruled and the case was tried in the trial court, over the continuing objections of petitioner, with respect to introduction of evidence pertaining to punitive damage issues. Petitioner objected to all offered instructions to the jury that instructed on the punitive damages issue. All of petitioner's objections to punitive damage instructions were denied by the trial court.

Judgment on a jury verdict in favor of respondent in

the amount of $580,000 was entered following the trial and petitioner appealed to the Montana Supreme Court.

Petitioner sought reversal in the Montana Supreme Court based on several issues, the foremost of which was the issue of whether or not punitive damages are an element of damage that can be considered in FELA cases.

The Montana Supreme Court affirmed the judgment of the trial court in a unanimous opinion entered August 31, 1977, a copy of which is attached to this petition as Appendix A.

In support of its contention that punitive damages are not an element of damage to be considered in FELA cases petitioner placed principal reliance on the authority of *Kozar v. Chesapeake & Ohio Railway Co.*, 449 F.2d 1238 (1971), a case decided by the Court of Appeals for the Sixth Circuit. A copy of that part of the report in *Kozar* that pertains to the punitive damage issue is attached to this petition as Appendix E.

REASONS FOR GRANTING THE WRIT

1. The decision of the Montana Supreme Court (Appendix A hereto) has decided a Federal question of substance that has not heretofore been determined by the Supreme Court of the United States.

The Montana Supreme Court decided the question in such a way that the Montana Supreme Court decision is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Kozar v. Chesapeake & Ohio Railway*, 449 F.2d 1238 (1971), on the issue of punitive damages in FELA cases (Appendix E hereto).

Indeed, the Montana Supreme Court decision (Appendix A hereto) is in direct conflict with a prior decision of the Montana Supreme Court, *State ex rel. Burlington*

Northern Inc. v. District Court, . . . Mont. . . ., 548 P.2d 1390 (1976) (Appendix F hereto), in which the Montana Supreme Court held squarely that punitive damages cannot be considered in an FELA case.

2. The question of whether or not punitive damages may be considered as one of the elements of damage in FELA cases is an important substantive question which should be considered and decided by this court.

The Supreme Court of the United States has long adhered to the rule stated in *Chesapeake & Ohio R. Co. v. Kelly*, 36 S.Ct. 630, 241 U.S. 45, 60 L.Ed. 1117, 1123 (1916):

> "But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal employers' liability act it must be settled according to general principles of law as administered in the Federal courts."

The highest Federal court that has ruled on the issue presented in this Petition is the Court of Appeals for the Sixth Circuit which ruled, in *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, that punitive damages cannot be considered in an FELA case. The Sixth Circuit Court said:

> "Admittedly, the legislative history of the Act shows that its provisions were not to limit or take away any 'remedy' available at common law to an injured employee. But it is a mistake to characterize the right to recover punitive damages at common law a 'common law remedy'. There is an important distinction between a 'remedy' which Bouvier's Law Dictionary defines as 'the means employed to enforce a right or redress an injury', and 'damages' which are defined as '[t]he indemnity recoverable by a per-

son who has sustained an injury * * * and the term includes not only compensatory, but also exemplary or punitive or vindictive * * * damages.' Damages are simply a measure of injury, and to say that at common law there was 'punitive damages as a right of action' or there was available 'the common law remedy action of punitive damages' or a 'punitive damages remedy' is a misuse of the legal terminology. Thus, when the legislative history of the Act is examined and shows that Congress never intended the Act as a restriction on the remedies available to an injured employee, it is not referring to a damages theory. Moreover, the cases cited by the District Court as examples of early common law cases permitting recovery of punitive damages are distinguishable from the case of a railroad employee or an employee's administrator suing his employer for injuries or death suffered on the job. Most of the cases relied upon by the District Court are cases of intentional torts.

The District Court, in its 'Omnibus Opinion', correctly set forth the humanitarian and beneficient reasons for the adoption of the Federal Employers' Liability Act by Congress. However, no matter how persuasive this policy argument may be, it cannot stand as the law in light of the clear, unambiguous statements in the line of Supreme Court authorities holding that damages recoverable under the Act are compensatory only."

The decision of the Montana Supreme Court (Appendix A hereto) attempts to duck the issue by stating that the allowance of evidence with respect to punitive damage issues was not prejudicial to petitioner. This is tantamount to saying that it is all right to allow evidence with respect to punitive damage issues in an FELA case so

long as the jury apparently doesn't find in favor of the plaintiff on those issues.

Such a result would allow each jurisdiction to treat the issue of whether or not punitive damages are an element of damage that can be considered in FELA cases as it sees fit.

3. It is submitted that the decision of the Montana Supreme Court (Appendix A hereto) is in error because the Montana Supreme Court failed to follow the rule that punitive damages cannot be considered in FELA cases established in *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238 (1971).

The Supreme Court of the United States in *Dice v. Akron, Canton & Youngstown Railroad Company*, 342 U.S. 359, 96 L.Ed. 398, 72 S.Ct. 312 (1952), stated, at 96 L.Ed. 398, 403:

> "Congress in Sec. 1 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. State laws are not controlling in determining what the incidents of this federal right shall be. Chesapeake & Ohio R. Co. v. Kuhn, 284 U.S. 44, 76 L ed 157, 52 S Ct 45; Ricketts v. Pennsylvania Ro. Co. (CA2d NY) 153 F2d 757, 759, 164 ALR 387. Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes. See Garrett v. Moore McCormack Co. 317 US 239, 244, 87 L ed 239, 243, 63 S Ct 246, and cases there cited."

APPENDIX A

JUDGMENT OF THE SUPREME COURT OF MONTANA

DATED AUGUST 31, 1977

No. 13097

IN THE SUPREME COURT OF THE STATE OF MONTANA

1977

HELEN TORCHIA, individually and as a personal representative,

Plaintiff and Appellant,

— vs —

BURLINGTON NORTHERN, INC., a corporation,

Defendant and Respondent and Cross Appellant.

Appeal from:

District Court of the Eighth Judicial District, Hon. Paul G. Hatfield, Judge presiding.

Counsel of Record:

For Appellant:

Gough, Booth, Shanahan and Johnson, Helena, Montana

Cordell Johnson argued, Helena, Montana

For Respondent:

Hoyt and Bottomly, Great Falls, Montana

John C. Hoyt argued and Richard V. Bottomly argued, Great Falls, Montana.

Submitted: June 6, 1977

Decided: Aug. 31, 1977

Filed:

Thomas J. Kearney, *Clerk*

Hon. M. James Sorte, District Judge, delivered the Opinion of the Court:

This is a wrongful death action filed in the district court, Cascade County, under the Federal Employers' Liability Act, 45 U.S.C. § 51 et. seq. (FELA).

Plaintiff Helen Torchia as personal representative of the estate of decedent Gennaro Torchia, and on behalf of their children, sued defendant Burlington Northern, Inc. for damages occasioned by the death of her husband Gennaro Torchia.

Gennaro Torchia, a Burlington Northern fireman, was killed in a head-on collision between two railroad trains. In her complaint plaintiff alleged negligence under the FELA and prayed for compensatory damages. She also, individually and as personal representative of the minor children, alleged willful and wanton conduct and prayed for punitive damages. In its amended answer, defendant admitted liability for negligence under the FELA. The trial court denied defendant's motion to strike those allegations from the complaint which had reference to punitive damages.

The case was tried to a jury on the issues of compensatory damages and conduct which would form the basis for an award of punitive damages. The jury returned a verdict for plaintiff for compensatory damages only, in the amount of $580,000. The jury found the facts did not justify an award of punitive damages. Defendant appeals from the judgment entered on the jury verdict. Plaintiff crossappeals from an order denying her motion for a new trial on the issue of punitive damages.

The facts of this case:

At approximately 11:45 p.m. on May 11, 1971, at a point near Sheffels on the Burlington Northern line between Great Falls and Havre, there was a head-on collision between two trains. Four of defendant's employees were killed and several others injured. One of those killed was plaintiff's husband, Gennaro Torchia.

The movement of trains between Great Falls and Havre is controlled out of the dispatcher's office in Havre. Trains are operated over this segment of the track by train orders and clearances. The Havre to Great Falls route consists of but one track. Thus, the orders and clearances are significant in controlling train movements where a "meet" is anticipated between trains traveling in opposite directions.

A dispatcher issues various orders to the operators at various stations on the line. The orders are communicated from the dispatcher to the operator by telephone. The operator then copies the orders on train order forms. The orders are then read back to the dispatcher to insure the copied orders are correct.

It is also the responsibility of the dispatcher to issue clearances which are communicated to and copied by the operator in the same manner as are train orders. A train is not allowed to move over a track which is controlled by train orders and clearances unless a proper clearance is issued for the train movement. Typically, orders and clearances are not issued until the train has been "called", that is, assembled and ready for departure. Generally, the conductor in charge of the train and crew picks up the orders and clearances from the operator. When it becomes necessary to issue a second order and clearance on a given train movement, the first orders and clearance are taken up and destroyed.

In 1971 it was and had been for many years the practice in Havre for the operator to place copies of the

completed clearances and orders on the train register desk in the Havre Relay Office. There was no procedure whereby it could be determined when the orders were actually picked up by the conductor.

In this case Dispatcher Newell was on shift from 7:30 a.m. until 3:30 p.m. on May 11, 1971. He issued orders and a clearance at 3:08 p.m. for the Havre to Great Falls train, designated as "Extra 2013 West." Newell expected the train would be called momentarily. Operator Wirtzberger then placed the clearance and orders on the train register desk. At that time Newell was unaware a train was being assembled in Great Falls destined for Havre, also to leave on May 11.

Newell turned over his dispatching district to Dispatcher McMaster at 3:30 p.m. Pursuant to the then operative "staggered shift" work system, McMaster who was on duty dispatching another district was, in addition, given responsibility for Newell's district until 4:30 p.m. Newell explained to McMaster that he had cleared the Havre to Great Falls train. The clearance is reflected in the clearance record kept by the dispatcher. There was no dispatching activity during the hour McMaster had responsibility for the district so no further entries were made in the dispatcher's book. At the end of his shift McMaster merely initialed the record book and passed it on to Dispatcher Magnuson.

There is a dispute in the evidence as to whether McMaster verbally informed Magnuson the Havre to Great Falls train was cleared when the dispatching district was turned over to him. McMaster testified he informed Magnuson of the clearance. Magnuson testified no such statements were made. However, there is no dispute the records McMaster turned over to Magnuson

clearly indicated the train had been cleared at 3:08 p.m. by Newell.

Magnuson, during his dispatching shift, was informed that a train would soon be leaving Great Falls bound for Havre. To arrange for a "meet" between the respective trains whereby one would take a side track as the other passed by, Magnuson issued a second order and clearance at 8:18 p.m. The second order and clearance were communicated to Operator Porter, who prepared them and placed them on the train register desk.

Sometime between the time Operator Wirtzberger placed the first order and clearance on the train register desk and the time the second order and clearance were placed on the desk, Conductor Freeburg, conductor for "Extra 2013 West", came into the Havre Relay Office and picked up the first orders and clearance. He was not seen picking up the orders and clearance by any dispatcher or operator.

Plaintiff's husband, Gennaro Torchia, was a member of the crew of the Great Falls to Havre train. Under the second orders issued to that train, but unknown to Conductor Freeburg of "Extra 2013 West" and its crew, it was to proceed to Portage where a "meet" would take place. The Havre to Great Falls train was to wait at Portage to permit the Great Falls to Havre train to take the siding.

The Havre to Great Falls train passed the siding at Portage without stopping and, shortly beyond Sheffels, the head-on collision between the two trains occurred. Gennaro Torchia was killed instantly. At the time of his death he was 49 years of age. Additional pertinent facts will appear later in this opinion.

Defendant raises numerous points of error on appeal.

For this opinion we will discuss eight determinative issues:

1. Whether punitive damages are recoverable in an action under the FELA?

2. Whether the verdict should be set aside as being excessive and based on passion or prejudice?

3. Whether the voir dire examination by counsel for plaintiff was improper?

4. Whether admission of evidence pertaining to future railroad retirement benefits was error?

5. Whether the trial court erred in admitting certain testimony given by plaintiff's expert witness in the area of economics?

6. Whether a potential witness for defendant, whose name was not listed on the pretrial order, should have been permitted to testify?

7. Whether the trial court erred in selection of instructions and form of verdict?

8. Whether admission into evidence of a portion of the Federal Railroad Administration Accident report was prejudicial error?

Issue 1. A major contention of defendant is that punitive damages should not have been an issue in the case, and evidence and proposed instructions related thereto should not have been permitted. Defendant asserts such issue should have been removed upon its motion to strike. Defendant alleges punitive damages are not allowable under the FELA, and allowing plaintiff to introduce proof not only of liability, but also on the question of punitive damages was prejudicial and resulted in an excessive award as a result of passion and prejudice on the part of the jury.

As noted, defendant admitted its liability for ordinary negligence. At the outset we reject defendant's theory that upon such an admission, plaintiff's case must be limited solely to the issue of damages. Under the facts of this case plaintiff could prove her case as she wishes subject, of course, to the ordinary control and discretion exercised by the trial judge.

Whether or not evidence of punitive damages has a proper place in an action under the FELA, the jury here refused to allow such damages to plaintiff. In view of the evidence presented by plaintiff and the result reached by the jury, the presence of the element of punitive damages did not prejudice defendant in this case. Slifer v. Yorath, 52 Mont. 129, 155 P. 1113; Martin v. Corscadden, 34 Mont. 308, 86 P. 33. Further, the same reasoning applies with reference to the alleged error in the giving of instructions on willful and wanton misconduct and other matters relative to punitive damages. The salient fact remains the jury refused to award such damages and, in fact, specifically found there was no evidence of conduct which would form the basis for punitive damages. Defendant suffered no prejudice as a result. Hill v. Chappel Bros. of Montana, Inc. 93 Mont. 92, 18 P.2d 1106.

Issue 2. Was the jury verdict excessive and based upon passion and prejudice?

Defendant asserts there must be substantial evidence in the record upon which the jury award can be predicated, citing Montana cases. While there was more than substantial evidence in the record to justify the jury's award, nevertheless this is not the applicable standard under the Federal Employers' Liability Act. In Resner v. The N.P. Railway, 161 Mont. 177, 505 P.2d 86 (1973), this Court quoted the standard as set out in Lav-

ender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L ed 916, 923, a Federal Employers' Liability Act case. There the United States Supreme Court said:

> " 'It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where * * * there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusions. *And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.*' (Emphasis added.)" 161 Mont. 183.

Plaintiff's evidence of damages was almost entirely uncontradicted. Through the testimony of various witnesses, plaintiff elicited facts and figures which, when projected into the future and discounted to present value, would reasonably support a verdict such as was rendered in this case. The trial judge agreed the verdict was not unjust and a new trial was not granted to defendant. We refuse to disturb the findings of the jury.

Issue 3. This issue involves alleged improper voir dire examination of prospective jurors by counsel for plaintiff. Nothing at all appears in the record suggestive of the statements attributed to counsel. The law is clear that unless there is a record of the alleged error, this Court will not consider the matter. Kipp v. Willoughby,

161 Mont. 432, 506 P.2d 1365; Nissen v. Western Construction Equipment Co., 133 Mont. 143, 320 P.2d 997. Defendant's argument in this regard is without merit.

Issue 4. Did the trial court err in allowing the testimony of plaintiff's witness, Judith Kirkness, an employee of the United States Railroad Retirement Board, concerning retirement benefits? The core of defendant's argument is that the witness was asked to make certain assumptions, while the facts forming the basis for such assumptions were not of record or in evidence.

The record shows that, at some time in advance of trial, defense counsel verbally stipulated to the evidence to be elicited from witness Kirkness. In fact, he had so stipulated in a previous FELA action. However, immediately before the instant trial, defense counsel informed counsel for plaintiff Burlington Northern had assigned a Minnesota attorney to direct the case for defendant and as a result the prior stipulation was no longer valid. He then suggested plaintiff call Judy Kirkness as a witness. We note at this point that such tactics on the part of the new counsel are strongly disapproved by this Court.

The proposed evidence and the procedure to be employed in developing it was discussed in chambers and fully considered by the trial judge. The witness was to determine the amount of benefits Gennaro Torchia would have been entitled to upon retirement from the railroad. The factors to be considered in arriving at such a computation are the employee's age, marital status, length of employment, rate of compensation, and length of military service. These facts pertaining to Gennaro Torchia, were substantially in evidence and presented in a correct fashion to the witness for her determination. The resulting testimony was properly admitted as it was based upon evidence before the court.

Graham v. Rolandson, 150 Mont. 270, 435 P.2d 263; Burns v. Fisher, 132 Mont. 26, 313 P.2d 1044.

Issue 5. Defendant alleges error in the admission by the trial court of testimony of plaintiff's economic expert, Dr. George P. Heliker, on the issue of economic loss suffered as a result of the death of Gennaro Torchia. It is argued the expert opinions were speculative on future inflationary trends, in forecasting loss of earnings, in forecasting future earnings without considering the impact of income taxes thereon, and in forecasting loss of future Railroad Retirement Benefits.

Proof of the present value of a future economic loss is necessarily uncertain to a degree. Any determination of factors such as growth in the size of the total labor force, output per man/hour, wage trends and inflationary patterns is admittedly grounded in probabilities. However, this does not mean the amount of a future loss is not provable. Such losses are best proved through employment of economic and statistical disciplines, applied to the very factors listed above, as this Court has recognized in numerous prior decisions. Where, as here, the testimony of a specialist presents a jury with a reasonable basis upon which to estimate, with some degree of certainty, the probable future losses occasioned by the death of decedent, such testimony should be admitted. Resner v. The N.P. Railway, supra; Krohmer v. Dahl, 145 Mont. 491, 402 P.2d 979. See Lavender v. Kurn, supra, for a general discussion of trends involving speculation and conjecture in ascertaining damages in FELA actions.

Defendant was aware, pretrial, that plaintiff intended to call Dr. Heliker to testify to precisely those matters defendant now disputes. The opportunity to contest the accuracy of such testimony, through its own expert

testimony, was available to defendant. However, it chose not to call an expert witness on these matters.

Issue 6. Did the trial court err in excluding the testimony of defendant's proposed witness S. M. Smiland, with respect to insurance benefits, wages, damages, etc.?

We emphasize here that considerable pretrial discovery and discussion was had in this case, during which the identities of all witnesses were disclosed and listed in the pretrial order. However, the name of S. M. Smiland first appears following plaintiff's case-in-chief. There is no record plaintiff knew witness Smiland, or that he was present in Great Falls during a portion of the trial. He was never introduced to plaintiff and plaintiff was afforded no opportunity to talk to Smiland before his proposed testimony was to begin. Under the circumstances, it was certainly within the discretion of the trial judge to allow or disallow the witness to testify. Sanders v. Mount Haggin Livestock Co., supra.

Issue 7. This issue concerns instructions given and refused by the trial court.

Court's instructions No. 14 and No. 20 were objected to by defendant on the grounds a decedent father's comfort, protection, society, education and companionship are not proper elements of damage recoverable under the FELA. Instruction No. 14 provides in part:

"* * *

"You may also consider and award such sum as you may determine represents the pecuniary value of any loss, if any, sustained by the widow and the family by reason of being deprived of Gennaro Torchia's comfort, protection, society, education and companionship. In considering such pecuniary loss, you may consider the age and life expectancy

of the wife and family in relation to the age of the decedent, the disposition of the deceased, whether it was kindly, affectionate, or otherwise, the degree of intimacy existing between the deceased and his family, their station in life, and such other facts shown by the evidence which may throw light upon such loss which the heirs reasonably might have expected to receive from the deceased, had he lived. * * *"

Instruction No. 20 states:

"You are instructed that:

"You have heretofore been instructed on damages which may be allowed to wife and family for the death of Gennaro Torchia. One of the elements of such damage is the pecuniary value of the society, comfort, care, companionship, protection and education the wife and family have lost by reason of his death. If you find from the evidence that the deceased did provide society, comfort, care, companionship, protection and education, which went to the moral or physical training and well-being of the widow and family, this loss if it has pecuniary or financial value, may be measured and compensated. * * *"

It is true damages under the FELA are measured by and limited to the pecuniary loss sustained by the survivors as a result of the death of the employee. Mellon v. Goodyear, 277 U.S. 335, 48 S.Ct. 541, 72 L ed 906; Michigan Central R. Co. v. Vreeland, 227 U.S. 59, 33 S.Ct. 192, 57 L ed 417. Recovery is authorized only to the extent the survivors are shown to have been deprived of a reasonable expectation of financial benefits, assistance or support. Mellon v. Goodyear, supra; See Anno: 67 ALR2d 745, 746. However, the pecuniary value associated with the loss of parental care, guidance

and education the decedent would expectably have *given his minor children*, is recoverable under the FELA. Norfolk & Western R. Co. v. Holbrook, 235 U.S. 625, 35 S.Ct. 143, 59 L ed 392; Michigan Central R. Co. v. Vreeland, supra.

In determining the extent of contribution which is reasonable to be anticipated by the beneficiaries, the jury may properly consider evidence the decedent was industrious, thrifty, kind and faithful to his family. Allendorf v. Elgin, Joliet & Eastern R. Co., 8 Ill.2d 164, 133 N.E.2d 288, 79 ALR2d 241, cert. den. 352 U.S. 833, 77 S.Ct. 49, 1 L ed 2d 53, reh.den. 352 U.S. 937, 77 S.Ct. 219, 1 L ed 2d 170.

Contained within the court's instructions No. 14 and No. 20 is language having the effect of limiting recovery to the pecuniary value of losses sustained. Further, the language speaks to limiting losses to those which the survivors reasonably might have expected to receive from decedent, had he lived. Plaintiff's evidence pertaining to the extent of the loss of parental care, guidance and education was ample and uncontradicted, as was the evidence demonstrating the decedent was industrious, thrifty, kind and faithful to his family

Thus, while there may have been minor variations in the instructions from the accepted measure of damages in FELA actions, they cannot be said to have prejudiced the defendant. The instructions were not totally confined to an FELA death action, there being variations but on those variations no evidence was adduced at trial. We find no prejudice.

Defendant also objects to the giving of court's instruction No. 19, which provides:

"You are instructed that:

"In considering the loss of contribution to the family from future earnings of decedent you are instructed that you should first reduce future earnings to present value using a reasonable rate of discount for this purpose. The evidence as to annual inflation which has an effect on depreciating the value of a dollar should also be considered as to what extent such depreciation offsets the interest that could be earned on an award of future earnings. In addition, you may consider wage increases the deceased might have expected to receive in arriving at deceased's true loss of future earnings and earning capacity."

As previously pointed out, this Court approves of consideration by the jury of the fact of inflation in arriving at an award for loss of future earnings, where the evidence as to annual inflation and related matters is presented, as here, in a competent manner. Resner v. The N.P. Railway, supra.

The trial court refused defendant's proposed instruction No. 8 as being duplicitous. We find it to have been properly refused by the trial court.

The court also refused to give defendant's proposed instructions No. 14, No. 15 and No. 16, on consideration of the impact of income taxes on damage awards. In so doing, the trial court was in accord with the weight of authority. Future income tax liability is not a proper consideration in an award for loss of future earnings. Bracy v. Great Northern Ry. Co., 136 Mont. 65, 343 P.2d 848.

Defendant relies on Burlington Northern, Inc. v. Boxberger, 529 F.2d 284 (1975), for the proposition that future tax liability should be considered in making a damage award. A careful reading of *Boxberger*, however,

discloses that it is an admitted departure from the majority position. The court therein stated that an instruction on the effect of future income tax liability is proper when competent evidence is brought forth at trial showing the likely amount of tax. Defendant here has made no such showing.

A further objection raised by defendant was to the form of the verdict approved by the trial court in that it includes items of compensatory damage not contemplated under the FELA. The same reasoning employed regarding defendkant's objection to court's instructions No. 14 and No. 20 is no less applicable in this instance. Defendant was not prejudiced by the form of verdict in this case.

Issue 8. This issue concerns the propriety of admission in evidence of conclusions contained in the Federal Railroad Administration Report of its investigation of the train wreck of May 11, 1971. 45 U.S.C. § 41 states:

"Neither the report required by section 38 of this title nor any report of the investigation provided for in section 40 of this title nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation."

During trial counsel for plaintiff read into the record, before the jury, a verbatim copy of certain conclusions contained in the accident report, which were incorporated into the complaint. Counsel was also permitted, over objection, to read to the jury an interrogatory to defendant and the amended answer thereto. The answer also contained accident report conclusions. In neither case was the report itself made a part of the record. At no time was the jury informed the statements being read

APPENDIX B

45 U.S.C. SECTION 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

APPENDIX C

PETITIONER'S MOTION TO STRIKE

IN THE DISTRICT COURT
OF THE EIGHTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF CASCADE

Civil No. 77820C

MOTION TO STRIKE

HELEN TORCHIA, individually and as a personal representative,
Plaintiff,

— vs —

BURLINGTON NORTHERN INC., a corporation,
Defendant.

COMES NOW defendant and moves this Court for an order striking certain portions of plaintiff's complaint as follows:

1. To strike that portion of Paragraph VIII, subparagraph B of the complaint that appears on Lines 18 through 29 on Page 6, and which reads as follows:

> "That the procedures employed by defendant's operators and dispatchers at Havre, Montana were not only in violation of its own rules and regulations of long standing and practice but also were a condoned method of handling clearances and train orders at the Havre operator's office which acts and conduct on the part of defendant were in utter reckless, wanton and grossly negligent disregard for the lives and safety of its train crews. That defendant knew or in the exercise of slight care should have known that its failure to enforce its rules and regulations and in addition thereto its participation by condonation of the violation of its own rules and

APPENDIX D

PETITIONER'S MOTION IN LIMINE AND MEMORANDUM OF POINTS AND AUTHORITIES

IN THE DISTRICT COURT
OF THE EIGHTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE
COUNTY OF CASCADE

Civil No. 77820C

DEFENDANT'S MOTION IN LIMINE

HELEN TORCHIA, individually and as
a personal representative,

Plaintiff,

vs.

BURLINGTON NORTHERN INC., a corporation,

Defendant.

Defendant respectfully moves the court *in limine* in the above case to strike and dismiss from the trial of this case the allegations contained in subparagraph B of paragraph VIII of plaintiff's complaint alleging reckless, wanton and grossly negligent conduct on the part of the defendant as well as subdivision 6 of the prayer for relief in plaintiff's complaint claiming punitive or exemplary damages because of said conduct. Defendant further moves the court to instruct the plaintiff and her counsel not to mention, refer to or interrogate concerning, in the presence of the jury, any allegations of reckless, wanton and grossly negligent conduct or any reference to punitive or exemplary damages in connection therewith.

Said motion is made on the grounds that punitive or exemplary damages are not a proper element of damages to be considered in this action brought by

plaintiff under the Federal Employers Liability Act and therefore said evidence is irrelevant, incompetent and highly prejudicial to defendant.

GOUGH, BOOTH, SHANAHAN & JOHNSON

By s/Cordell Johnson
Attorneys for Defendant
301 First National Bank Building
P. O. Box 1686
Helena, Montana 59601

MEMORANDUM OF POINTS AND AUTHORITIES

This action is brought by plaintiff under the provisions of the Federal Employers Liability Act, 45 U.S.C. § 51, et seq, seeking damages for the wrongful death of her husband. The issues in the trial of this case are governed by Federal Statutes and Federal case law. Under the authority of *Kozar v. Chesapeake & Ohio Railway Co.*, 449 F. 2d 1238 (C.A. 6 — 1971), punitive or exemplary damages are not recoverable in FELA actions. To permit evidence to be introduced at the trial of this case in support of a claim for exemplary or punitive damages will constitute error which cannot be remedied.

Dated this 7th day of April 1975.

Respectfully submitted,

GOUGH, BOOTH, SHANAHAN & JOHNSON

By s/Cordell Johnson
Attorneys for Defendant

APPENDIX E

EXTRACT OF THAT PART OF OPINION IN *KOZAR v. CHESAPEAKE AND OHIO RAILWAY CO.*, (449 F.2d 1238) THAT PERTAINS TO PUNITIVE DAMAGES

EXTRACT FROM OPINION IN *KOZAR v. CHESAPEAKE AND OHIO RAILWAY COMPANY*, 449 F.2d 1238, (1971):

Punitive Damages

Since we hold that punitive damages are not recoverable under the Federal Employers' Liability Act, no purpose would be served by setting forth the facts upon which the appellee relies to support the $70,000 award.

There are two basic reasons advanced in the "Omnibus Opinion" of the District Court for submitting to the jury, under the usual instructions, the issue of punitive damages. First, it is argued that the legislative history of the Act indicates that it was not its purpose to limit or take away any "remedy" available at common law and at common law punitive damages were available. Second, permitting the recovery of punitive damages advances the objective of the Act to "[place] such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of men in this dangerous employment." We conclude that neither reason is a sound basis for accepting an interpretation of the Act that would permit the unprecedented recovery of punitive damages.

Admittedly, the legislative history of the Act shows that its provisions were not to limit or take away any "remedy" available at common law to an injured employee. But it is a mistake to characterize the right to recover punitive damages at common law a "common law remedy". There is an important distinction between a "remedy" which Bouvier's Law Dictionary defines as "the means employed to enforce a right or redress an injury", and "damages" which are defined as "[t]he in-

demnity recoverable by a person who has sustained an injury * * * and the term includes not only compensatory, but also exemplary or punitive or vindictive * * * damages." Damages are simply a measure of injury, and to say that at common law there was "punitive damages as a right of action" or there was available "the common law remedy action of punitive damages" or a "punitive damages remedy" is a misuse of the legal terminology. Thus, when the legislative history of the Act is examined and shows that Congress never intended the Act as a restriction on the remedies available to an injured employee, it is not referring to a damages theory. Moreover, the cases cited by the District Court as examples of early common law cases permitting recovery of punitive damages are distinguishable from the case of a railroad employee or an employee's administrator suing his employer for injuries or death suffered on the job. Most of the cases relied upon by the District Court are cases of intentional torts.

The District Court, in its "Omnibus Opinion", correctly set forth the humanitarian and beneficient reasons for the adoption of the Federal Employers' Liability Act by Congress. However, no matter how persuasive this policy argument may be, it cannot stand as the law in light of the clear, unambiguous statements in the line of Supreme Court authorities holding that damages recoverable under the Act are compensatory only.

In Gulf, Colorado and Santa Fe Railway Company v. McGinnis, 228 U.S. 173, 175-176, 33 S.Ct. 426, 427, 57 L.Ed. 785 (1913), it is stated:

"In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employe' for the *actual pecuniary loss* re-

sulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some *pecuniary loss*. Michigan Central Railroad v. Vreeland, 227 U.S. 59, [33 S.Ct. 192, 57 L.Ed. 417]; American Railroad [Co. of Porto Rico] v. Didricksen, 227 U.S. 145, 33 S.Ct. 224, 57 L.Ed. 456]. In the last cited case, speaking of the Employers' Liability Act, we said (p. 149, [33 S.Ct. p. 225]): "The cause of action which was created in behalf of the injured employe' did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employe' from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. *The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe'. The damage is limited strictly to the financial loss thus sustained.*'

"The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual *pecuniary loss*. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no *pecuniary loss*." (Emphasis added).

In Michigan Central Railroad Company v. Vreeland, 227 U.S. 59, 68-69, 33 S.Ct. 192, 195, 57 L.Ed. 417 (1913), in commenting upon the type of action created by the Federal Employers' Liability Act and the damages recoverable, the following unequivocal statements are made:

It is a liability for the loss and damage sustained by relatives dependent upon the decedent. *It is therefore a liability for the pecuniary damage resulting to them, and for that only.*

"The statute [Federal Employers' Liability Act] in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being—that of 9 and 10 Vict., known as Lord Campbell's act. This act has been, in its distinguishing features, reenacted in many of the states, and both in the courts of the states and of England has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, *pecuniarily*, resulting to them from his wrongful death." (Emphasis added).

In American Railroad Company of Porto Rico v. Didricksen, 227 U.S. 145, 149, 33 S.Ct. 224, 225, 57 L.Ed. 456 (1913), the rule that only pecuniary damages are recoverable under the FELA is reiterated.

"But the act, in case of the death of such an employe' from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of *pecuniary benefits* by the wrongful death of the injured employe'. *The damage is limited strictly to the financial loss thus sustained.*" (Emphasis added).

Also, in the early case of Cain v. Southern Railway Company, 199 F. 211 (C.C.E.D.Tenn., 1911), it was held that recovery of damages under the Act of 1908 is

limited to the "* * * pecuniary injury or loss sustained by the beneficiaries from the death of the deceased * * *" and "* * * excluding all consideration of punitive elements. * * *" In Thompson v. Camp, 163 F.2d 396, 403 (6th Cir. 1947), cert. denied, 333 U.S. 831, 68 S.Ct. 458, 92 L.Ed. 116, motion sustained, 167 F.2s 733, cert. denied, 335 U.S. 824, 69 S.Ct. 48, 93 L.Ed. 378, the "general rule" was also stated:

"Damages in such a case 'should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased', and 'that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon the basis of their present value only', Chesapeake & O. R. Co. v. Kelly, 241 U.S. 485 at page 489, 491, [36 S.Ct. 630, 60 L.Ed. 1117]; * * * Gulf, C. & S. F. Ry. v. Moser, 275 U.S. 133 [48 S.Ct. 49, 72 L.Ed. 200]."

We do not believe that United States Steel Corporation v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969), which reversed the District Court in Petition of Den Norske Amerikalinje A/S, 276 F.Supp. 163 (N.D.Ohio, 1967), requires a different result from the conclusion that punitive damages are not recoverable under FELA. *Den Norske* did hold that punitive damages were recoverable from a tortfeasor in an admiralty proceeding and volunteered the statement that Section 59 of FELA permitted a deceased railroader to sue for punitive damages. However, the Mississippi case of Ennis v. Yazoo & M. V. Ry., 118 Miss. 509, 79 So. 73 (1918), cited by the District Court as allowing punitive damages was a state wrongful death action controlled by state law, and actually by way of negative inference the opinion of the Mississippi court recognizes that compensatory damages

are the "measure of damages * * * recoverable under the Federal Employers' Liability Act." Also, the statement in the opinion of the District Court that Section 59 of the Act added by the Amendment of 1910 permits recovery of punitive damages is refuted in St. Louis I. M. & S. R. Company v. Craft, 237 U.S. 648, 658, 35 S.Ct. 704, 706, 59 L.Ed. 1160 (1915).

> "On the contrary, it [§ 59] means that the right existing in the injured person at his death—a right covering his loss and suffering while he lived, but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life—shall survive to his personal representative to the end that it may be enforced and the proceeds paid to the relatives indicated. And when this provision and § 1 are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own *pecuniary* loss, but also such damages as will be reasonably *compensatory* for the loss and suffering of the injured person while he lived." (Emphasis added).

Den Norske was reversed by this Court in *Fuhrman* on the grounds that the findings of fact upon which the District Court relied to make the award of punitive damages were clearly erroneous, and any inference that may be extracted from the reading of *Fuhrman* that punitive damages may be recoverable in an admiralty proceeding cannot be regarded as controlling in this case.

For the foregoing reasons, that part of the judgment in this case making an award for punitive damages is vacated. It should also be noted that there is not a single case since the enactment of FELA in 1908 in which punitive damages have been allowed.

APPENDIX F

DECISION OF MONTANA SUPREME COURT IN *STATE EX REL. BURLINGTON NORTHERN, INC. v. DISTRICT COURT,*

(. . . Mont. . . . , 548 P.2d 1390)

STATE of Montana ex rel. BURLINGTON NORTHERN, INC., Relator,

v.

The DISTRICT COURT OF the EIGHTH JUDICIAL DISTRICT of the State of Montana, IN AND FOR the COUNTY OF CASCADE, and the Hon. Nat Allen, judge presiding, Respondents.

No. 13295.

Submitted March 17, 1976.

Decided April 14, 1976.

JOHN C. HARRISON, Justice.

This is an original proceeding. Relator Burlington Northern, Inc., petitioned this Court for a writ of supervisory control or other appropriate order. Ex parte presentation on March 4, 1976, was followed by an order of this Court for an adversary hearing on March 17, 1976. Briefs were submitted, the matter argued and taken under advisement by the Court.

This matter involves a Federal Employers' Liability Act (FELA) case which was before this Court previously (*McGee v. Burlington Northern, Inc.*, Mont., 540 P.2d 298, 32 St.Rep. 847). In that case relator appealed a jury verdict in the amount of $525,000 against relator to this Court. Following the jury verdict and judgment, relator railroad company failed to post a supersedeas bond within the period provided by the rules of appellate civil procedure and McGee levied on approximately $170,000 of the relator's assets before such bond was posted.

This Court, on appeal, vacated and set aside the judgment and ordered a new trial on the issue of damages.

Following denial of a rehearing on September 13, 1975, relator filed a motion on September 18, 1975, for an order requiring an accounting of funds levied on by McGee after the jury verdict and judgment and asked for an order for restitution of such funds and for costs on appeal.

Following the decision of this Court, McGee filed a petition for a writ of certiorari in the United States Supreme Court. The trial court ordered that McGee would not have to file briefs on the accounting and restitution or cost questions until 30 days after a ruling by the United States Supreme Court on the writ of certiorari in that Court.

On January 19, 1976, the Supreme Court of the United States denied the petition for a writ of certiorari.

The trial judge, Judge Allen, on January 27, 1976, set the case for trial on April 27, 1976. McGee then filed an amended complaint alleging the violation of the Federal Safety Appliance Act, which had been in the original complaint but which the original trial judge had deemed it not necessary to rule upon, and in addition alleged willful and wanton conduct by relator railroad company as a basis for punitive damages.

Relator railroad company filed consolidated motions directed at the amended complaint and renewed its previous motion for an accounting and an order requiring restitution of the funds McGee executed on following the judgment at the end of the first trial.

The trial judge denied relator's consolidated motions and relator instituted this proceeding under Rule 7 and Rule 17, Rules of Appellate Civil Procedure, asking this Court to exercise supervisory control over the district court in the case. The Court is requested to exercise control over three matters:

(1) Whether relator is entitled to restitution of funds taken by McGee on executions, where the district court judgment upon which the executions were based was set aside and vacated on appeal.

(2) Whether punitive damages can be considered for any purpose in an FELA case.

(3) Whether those portions of McGee's amended complaint which do not comply with the provisions of Rule 8, M.R.Civ.P., should be ordered stricken.

We will first consider issues (1) and (3). These issues are premature at this stage of the proceedings. Issue (1), the restitution of funds. We note that at the time of the first trial McGee received a verdict in the amount of $525,000 for serious injuries received. While that judgment was reversed, the matter was returned for retrial on the question of damages. Because of relator's failure to post a supersedeas bond, certain assets were levied upon and this Court finds no error on the part of the trial court in not granting relator's motion for an accounting at this stage of the case. Relator cites and argues *Anderson v. Border*, 87 Mont. 4, 285 P. 174, as controlling on the restitution of monies levied upon by McGee. We do not find *Anderson* controlling for in that case there was a final judgment from which no further appeal was taken. Here, the case is about to be retried. For this Court to now call for an accounting and restitution would not only interfere with the trial court's handling of the case, but would cause additional delay in a case that has been set for retrial on April 27, 1976.

Issue (3) is directed at the amended complaint. We will not interfere at this pretrial stage of the proceedings with the trial court's decision to allow the amended complaint to stand. While we agree that one of the

purposes of the Montana Rules of Civil Procedure is to provide simple, concise and direct pleadings, we do not find an abuse of discretion by the trial judge in not granting relator's motion to strike McGee's amended complaint. As previously noted, the amended complaint reinstated a count covering violation of the Federal Safety Appliance Act (45 U.S.C. § 1 et seq.). Federal cases construe this Act as an amendment to and a part of FELA (45 U.S.C. § 51 et seq.) and the two acts should be read and applied together. We find that punitive damages are not proper for a violation of this Act. *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 A.L.R.2d 252; *Chicago & N. W. Ry. Co. v. Chicago, R. I. & P. R. Co.*, D.C., 179 F.Supp. 33, 8 Cir., aff'd, 280 F.2d 110, cert. den., 364 U.S. 931, 81 S.Ct. 378, 5 L.Ed.2d 364; *International-G. N. Ry. Co. v. United States*, 5 Cir., 268 F.2d 409; *Holfester v. Long Island Railroad Co.*, 2 Cir., 360 F.2d 369; *Underwood v. Missouri-Kansas-Texas Railroad Co.*, 191 Kan. 338, 381 P.2d 510; *Atlantic Coast Line R. Co. v. Moore*, 135 Fla. 485, 186 So. 210.

The remaining issue, issue (2), that of allowing McGee to plead punitive damages in his amended complaint, was error on the part of the trial court. The Federal Employers' Liability Act is as its name implies, a federal act, and when applicable is the exclusive remedy against the railroads for injuries to their employees. *Metropolitan Coal Company v. Johnson*, 1 Cir., 265 F.2d 173. Any suits for injuries under the Act and rights to recover must be predicated on negligence. *Herdman v. Penn R. Co.*, 6 Cir., 228 F.2d 902, aff., 352 U.S. 518, 77 S.Ct. 455, 1 L.Ed.2d 508.

While the FELA provides that suits may be filed in either federal or state courts, there can be no question

that the rights created by the Act are governed by the decisions of the federal courts. *Bowman v. Illinois Central Railroad Co.*, 11 Ill.2d 186, 142 N.E.2d 104, cert. den., 355 U.S. 837, 78 S.Ct. 63, 2 L.Ed.2d 49. With the enactment of FELA, Congress took over the field of employers' liability to employees in interstate transportation by rail, and all state laws upon the subject were superseded. The rights and obligations of an employee and the employer depend on the FELA as construed by the federal courts. This Court recognized this principle in *Resner v. N. P. Ry. Co.*, 161 Mont. 177, 505 P.2d 86. See also *Davee v. Southern Pacific Company*, 58 Cal.2d 572, 25 Cal. Rptr. 445, 375 P.2d 293; *Dow v. Carnegie-Illinois Steel Corporation*, 3 Cir., 165 F.2d 777.

Therefore, for guidance on whether punitive damages are an element of damages to be considered in FELA cases, we look to the federal jurisdiction. We note here, that though FELA has been in existence nearly 70 years, the question of punitive damages has never been considered and passed on by the United States Supreme Court. The highest court to consider the question was the Sixth Circuit in 1971, when it overturned a ruling of a federal District Court, and ruled that punitive damages are not to be considered. In *Kozar v. Chesapeake and Ohio Railway Company*, 6 Cir., 449 F.2d 1238, 1240, 1242, the Court said:

> "Punitive Damages
>
> "Since we hold that punitive damages are not recoverable under the Federal Employers' Liability Act, no purpose would be served by setting forth the facts upon which the appellee relies to support the $70,000 award.
>
> "There are two basic reasons advanced in the 'Omnibus Opinion' of the District Court for submitting

to the jury, under the usual instructions, the issue of punitive damages. First, it is argued that the legislative history of the Act indicates that it was not its purpose to limit or take away any 'remedy' available at common law and at common law punitive damages were available. Second, permitting the recovery of punitive damages advances the objective of the Act to '[place] such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of men in this dangerous employment.' We conclude that neither reason is a sound basis for accepting an interpretation of the Act that would permit the unprecedented recovery of punitive damages.

"Admittedly, the legislative history of the Act shows that its provisions were not to limit or take away any 'remedy' available at common law to an injured employee. But it is a mistake to characterize the right to recover punitive damages at common law a 'common law remedy'. There is an important distinction between a 'remedy' which Bouvier's Law Dictionary defines as 'the means employed to enforce a right or redress an injury', and 'damages' which are defined as '[t]he indemnity recoverable by a person who has sustained an injury * * * and the term includes not only compensatory, but also exemplary or punitive or vindictive * * * damages.' Damages are simply a measure of injury, and to say that at common law there was 'punitive damages as a right of action' or there was available 'the common law remedy action of punitive damages' or a 'punitive damages remedy' is a misuse of the legal terminology. Thus, when the legislative history of the Act is examined and shows that Congress never intended the Act as a restriction on the remedies available to an injured employee, it is not referring

to a damages theory. Moreover, the cases cited by the District Court as examples of early common law cases permitting recovery of punitive damages are distinguishable from the case of a railroad employee or an employee's administrator suing his employer for injuries or death suffered on the job. Most of the cases relied upon by the District Court are cases of intentional torts.

"The District Court, in its 'Omnibus Opinion', correctly set forth the humanitarian and beneficient reasons for the adoption of the Federal Employers' Liability Act by Congress. However, no matter how persuasive this policy argument may be, it cannot stand as the law in light of the clear, unambiguous statements in the line of Supreme Court authorities holding that damages recoverable under the Act are compensatory only.

"In *Gulf, Colorado and Santa Fe Railway Company v. McGinnis*, 228 U.S. 173, 175-176, 33 S.Ct. 426, 427, 57 L.Ed. 785 (1913), it is stated:

" 'In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employe' for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss. *Michigan Central Railroad v. Vreeland*, 227 U.S. 59, [33 S.Ct. 192, 57 L.Ed. 417]; *American Railroad [Co. of Porto Rico] v. Didricksen*, 227 U.S. 145, 33 S.Ct. 224, 57 L.Ed. 456]. In the last cited case, speaking of the Employers' Liability Act, we said (p. 149, [33 S.Ct. p. 225]): "The cause of action which was created in behalf of the injured employe' did not

survive his death, nor pass to his representatives. But the act, in case of the death of such an employe' from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe'. The damage is limited strictly to the financial loss thus sustained."

" 'The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss.' * * *.

"In *Michigan Central Railroad Company v. Vreeland*, 227 U.S. 59, 68-69, 33 S.Ct. 192, 195, 57 L.Ed. 417 (1913), in commenting upon the type of action created by the Federal Employers' Liability Act and the damages recoverable, the following unequivocal statements are made:

" 'It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only. * * *' "

McGee cites and argues a number of cases decided before *Kozar:* Petition of Den Norske Amerikalinje, D.C., 276 F.Supp. 163; *Gunnip v. Warner, Co.*, D.C., 43 F.R.D. 365; 10 A.L.R.Fed. 528; *Phillip v. United States Lines Co.*, D.C., 240 F.Supp. 992; *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282. Parti-

cular reliance is placed in the case of *United States Steel Corporation v. Fuhrman*, 6 Cir., 407 F.2d 1143, 10 A.L.R.Fed. 500, cert. den., 398 U.S. 958, 90 S.Ct. 2162, 26 L.Ed.2d 542.

These same arguments were made with no avail to the Sixth Circuit in *Kozar*, where the Court held:

"We do not believe that *United States Steel Corporation v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), which reversed the District Court in Petition of Den Norske Amerikalinje A/S, 276 F.Supp. 163 (N.D.Ohio, 1967), requires a different result from the conclusion that punitive damages are not recoverable from a tortfeasor in an admiralty proceeding and volunteered the statement that Section 59 of FELA permitted a deceased railroader to sue for punitive damages. However, the Mississippi case of *Ennis v. Yazoo & M. V. Ry.*, 118 Miss. 509, 79 So. 73 (1918), cited by the District Court as allowing punitive damages was a state wrongful death action controlled by state law, and actually by way of negative inference the opinion of the Mississippi court recognizes that compensatory damages are the 'measure of damages * * * recoverable under the Federal Employers' Liability Act.' Also, the statement in the opinion of the District Court that Section 59 of the Act added by the Amendment of 1910 permits recovery of punitive damages is refuted in *St. Louis, I. M. & S. R. Company v. Craft*, 237 U.S. 648, 658, 35 S.Ct. 704, 706, 59 L.Ed. 1160 (1915).

" 'On the contrary, it [§ 59] means that the right existing in the injured person at his death—a right covering his loss and suffering while he lived, but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life—shall survive to his personal

> representative to the end that it may be enforced and the proceeds paid to the relatives indicated. And when this provision and § 1 are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own *pecuniary* loss, but also such damages as will be reasonably *compensatory* for the loss and suffering of the injured person while he lived.' (Emphasis added).
>
> "*Den Norske* was reversed by this Court in *Fuhrman* on the grounds that the findings of fact upon which the District Court relied to make the award of punitive damages were clearly erroneous, and any inference that may be extracted from the reading of *Fuhrman* that punitive damages may be recoverable in an admiralty proceeding cannot be regarded as controlling in this case."

For the foregoing reasons we hold that punitive damages cannot be considered in an FELA case.

This opinion shall constitute a writ of supervisory control for the guidance of the trial court.

CASTLES and HASWELL, JJ., and JACK D. SHANSTROM, District Judge,* concur.

DALY, Justice, specially concurring in part and dissenting in part:

I concur with the majority except as to the rationale submitted to support its holding on issue (2), punitive damages. We may be bound by the decisions of the highest federal court, however, I do not find the rationale in *Kozar* particularly persuasive.